***United States Court of Appeals***

***for the Second Circuit***

# INTERVENOR'S BRIEF

74-1283

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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| NATIONAL ASSOCIATION OF INDEPENDENT TELEVISION PRODUCERS AND DISTRIBUTORS, Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, Respondents, COLUMBIA BROADCASTING SYSTEM, INC., et al., Intervenors. | ) | Case No. 74-1168 |
| WESTINGHOUSE BROADCASTING COMPANY, INC., Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, Respondents, COLUMBIA BROADCASTING SYSTEM, INC., et al., Intervenors. | ) | Case No. 74-1283 |

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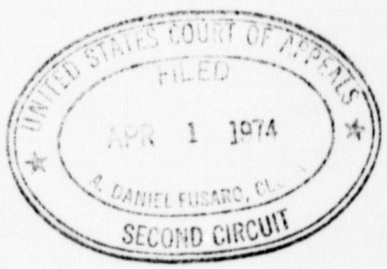


ON PETITIONS FOR REVIEW OF REPORT AND ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

# BRIEF FOR INTERVENOR AMERICAN BROADCASTING COMPANIES, INC.

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## ISSUES PRESENTED

1. Whether the Commission's adoption of revisions in the Prime Time Access Rule was a reasonable exercise of administrative discretion.

2. Whether the revised Rule is consistent with the First Amendment of the United States Constitution and Section 326 of the Communications Act.

3. Whether the Commission's Notice of Inquiry and Notice of Proposed Rule Making was adequate to support adoption of the revised Rule.

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ON PETITIONS FOR REVIEW OF REPORT AND ORDER
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# BRIEF FOR INTERVENOR AMERICAN BROADCASTING COMPANIES, INC.

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## COUNTERSTATEMENT OF THE CASE

American Broadcasting Companies, Inc. (ABC), adopts the Counterstatement of the Case set forth in the Brief of the Federal Communications Commission (Commission) and the United States of America. In addition ABC submits the following information concerning its own relationship to the original Prime Time Access Rule and the revised Rule.

Although ABC did not support adoption of the original Prime Time Access Rule, it acknowledged the Rule to be the least objectionable of the several restraints upon network operations which the Commission was considering. And ABC undertook, if the Commission adopted the Rule, to cooperate in trying to make it effective. Thus, ABC did not challenge the Prime Time Access Rule in the Mt. Mansfield proceeding.*/

In Comments and at Oral Argument in the Commission's Docket No. 19622 proceeding, ABC supported retention of the original Rule with only slight refinements. In particular ABC stressed the need for more time to give the Rule a fully meaningful test. In many respects its position was similar to that of Petitioners, National Association of Independent Television Producers and Distributors (NAITPD) and Westinghouse Broadcasting Company, Inc. (Westinghouse). Although ABC

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*/ Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1970).

supported retention of the original Rule rather than modifications as reflected in the revised Rule, as in 1970 it has accepted the Commission's decision as a reasonable exercise of regulatory discretion. At this juncture ABC is again undertaking to cooperate in trying to make the revised Rule effective.

In Comments and at Oral Argument, ABC also pointed out that one of the unanticipated but important public interest benefits following from the Rule was enhanced inter-network competition. The following is reproduced from the Comments (January 15, 1973):

> "Enhanced Inter-network Competition. For many years the Commission has been concerned with problems of inter-network competition, including specifically ABC's competitive disadvantage (stemming from its shorter lineup of affiliated stations) and the implications of that disadvantage for program service which ABC can offer. From 1963 through 1971 the ABC Television Network operated at substantial losses, totaling in excess of 100 million dollars. During that same period, the CBS and NBC Television Networks operated at substantial profits, in excess of 600 million dollars on a combined basis.
>
> "The Prime Time Access Rule, which resulted in a cutback of network schedules to three hours per night, has had beneficial effects for ABC (and may well have been beneficial for other networks as well). . . . 1972 has seen the ABC Television Network show a profit for the first time since 1962. While various factors have contributed to that result, the shorter evening schedule has been beneficial, resulting in better clearances for network programs.

"There are distinct public interest benefits associated with the ABC Television Network being profitable. These include the ability to expand and improve news and public affairs programming and the ability to undertake other improvements in network program service, such as ABC has done, and is doing, in the areas of children's programming and specials. */ These facts have been so frequently recognized by the Commission that they hardly need be repeated here."

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*/ ABC has undertaken to present increasing numbers of specials -- both in the entertainment and news/public affairs categories. For the First Quarter of 1973 alone, ABC has already scheduled more than 30 hours of special programs (exclusive of the live news coverage) in the prime time hours 8:00 - 11:00 p.m. (NYT).

Before the Commission, ABC also urged that another benefit which the Prime Time Access Rule had brought about was the practice by some stations, particularly in the larger television markets, of filling some of the access time with locally originated news and public affairs programming responsive to local community needs and interests. Documentation of the increasing prevalence of this practice was furnished. Subsequent to the submission of formal Comments but prior to the Commission's Oral Argument, ABC submitted a letter from its Senior Vice President and General Counsel, Everett H. Erlick, reflecting a further commitment by ABC, made possible by its improved competitive position,for local

programming by its owned stations, and also for certain innovations in network programming focusing upon minorities. That letter is reproduced as Appendix A to this Brief.

## ARGUMENT

### I. The Scope of Judicial Review of the Commission's Action Revising the Prime Time Access Rule Is Both Limited and Circumscribed

Petitioners NAITPD and Westinghouse seek review of the Report and Order of the Commission in its Docket No. 19622 released February 6, 1974. The Commission proceeding was rulemaking pursuant to Section 4 of the Administrative Procedure Act (5 U.S.C. §553(b)(3)), and was in the nature of a general exploration of the Prime Time Access Rule (47 C.F.R. §73.658(k))-- "whether it should be retained or rescinded, what modifications should be made in it if retained and...possible extensions of its scope and application". Report and Order, para. 1; JA 51. The proceeding resulted in retention of the Rule in somewhat revised form and retitled "Evening Programming Requirements".

As a threshold matter it is appropriate to set forth the applicable principles governing judicial review of the subject Report and Order. The Court's function was clearly described in Radio Relay Corp. v. FCC, 409 F.2d 322 (2d Cir. 1969), as follows:

> "In such cases our task is limited to determining 'whether the Commission has been guided by proper considerations in bringing the deposit of its experience, the disciplined feel of the expert, to bear'; that is, 'whether the Commission has fairly exercised its discretion within the vaguish, penumbral bounds expressed by the standard of "public interest."' F.C.C. v. RCA Communications, Inc., 346 U.S. 86, 91, 73 S.Ct. 998, 97 L.Ed. 1470 (1953). Thus, 'courts should not overrule an administrative decision merely because they disagree with its wisdom,' but only if they find it to be 'arbitrary or against the public interest as a matter of law.' Radio Corp. v. United States, 341 U.S. 412, 420, 71 S.Ct. 806, 810, 95 L.Ed. 1062 (1951)." (409 F.2d at 326).

The applicability of this standard to the Commission's adoption of the original Prime Time Access Rule was specifically acknowledged in Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971), where this Court also observed:

> "We should not, and indeed cannot, substitute our judgment for that of the Commission, Cornell University v. United States, 427 F.2d 680, 683 (2d Cir. 1970), nor inject 'our personal views regarding the effective utilization' of the communications media, National Broadcasting Co., Inc., supra, 319 U.S. at 218, 63 S.Ct. at 1010. (442 F.2d at 482).

And the standard of this Court is that which is generally followed by Courts in reviewing federal administrative actions. See, e.g., General Telephone Co. of the Southwest v. United States, 449 F.2d 846, 859 (5th Cir. 1971); Jacob Siegal Co. v. FTC, 327 U.S. 608, 611-12 (1946).

This particular case is a sequel to Mt. Mansfield Television, Inc. v. FCC, supra, where this Court, following the afore-stated standard for review, affirmed the Commission's adoption of the original Prime Time Access Rule and the related Syndicated and Financial Interest Rules (which have since been implemented and which are not here at issue).

That it was appropriate for the Commission to undertake to review and revise the Prime Time Access Rule is underscored by American Airlines, Inc. v. CAB, 359 F.2d 624 (D.C. Cir. 1966), where the Court observed that "it is part of the genius of the administrative process that its flexibility permits adoption of approaches subject to expedient adjustment in the light of experience" and that "it is the obligation of an agency to make re-examinations and adjustments in the light of experience" (359 F.2d at 633). This is the same rationale as expressed by the Supreme Court in American Trucking Ass'n. v. A.T. & S.F.RR. Co., 387 U.S. 397 (1967), where it held:

> " . . . the Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice. Compare SEC v. Chenery Corp., 332 U.S. 194 (1947); FCC v. WOKO, 329 U.S. 223 (1946). In fact, although we make no judgment as to the policy aspects of the Commission's action, this kind of flexibility

> and adaptability to changing needs and patterns . . . is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday." (387 U.S. at 416).

It should also be recognized that when an administrative agency undertakes to formulate a regulatory remedy for a condition which it is authorized to regulate, it has broad discretion in fashioning that remedy. In American Power and Light Company v. SEC, 329 U.S. 90 (1946) the Supreme Court said:

> "It is a fundamental principle...that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.' Phelps Dodge Corp. v. National Labor Relations Board, supra, (313 U.S. 194, 85 L.Ed. 1283, 61 S.Ct. 845, 133 ALR 1217)." (329 U.S. at 111-12).
>
> . . . .
>
> "In view of the rational basis for the Commission's choice [of remedy], the fact that other solutions might have been selected becomes immaterial. The Commission is the body which has the statutory duty of considering the possible solutions and choosing that which it considers most appropriate to the effectuation of the policies of the Act." (329 U.S. at 118).

See also Philadelphia Television Broadcasting Co. v. FCC, 359 F.2d 282, 284 (D.C.Cir.); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir.) cert. denied 403 U.S. 923 (1970).

Similarly, the Commission is entitled "to consider its total regulatory responsibilities when dealing with problems within a particular area of its jurisdiction." General Telephone Co. of California v. FCC, 413 F.2d 390, 399-400 (D.C. Cir.), cert. denied 396 U.S. 888 (1969). See also United States v. Southwestern Cable Co., 392 U.S. 157 (1968); Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359 (D.C. Cir.), cert. denied 375 U.S. 951 (1963).

Against this background, we turn to specific consideration of Petitioners' challenge to the Commission's Report and Order, adopted without dissent and spanning 84 single-spaced pages (plus Appendices and Concurring Statements of individual Commissioners).

## II. The Revised Rule Is A Reasonable Exercise of Commission Discretion in Formulating an Appropriate Regulatory Remedy

### A. The Original Rule Was Conceived As A Limited Restraint Upon Otherwise Desirable Network Operations In Order to Foster Program Source Diversity

The Commission has long recognized that network operations are desirable and in the public interest. As

long ago as 1953 the Commission observed:

> "We have long recognized that network broadcasting is an integral and necessary part of radio, and we have more recently extended this recognition of the benefits of network broadcasting to the field of television. We have also recognized that the public interest is served by competition among the networks, both radio and television." ABC-Paramount Merger Case, 17 FCC 264, 348; 8 RR 541, 624 (1953). */

Five years later the Commission again observed:

> "All groups concede that networks have made invaluable contributions to the public service in broadcasting through the major role they have played in the development of our national television system and the provision of a national program service of entertainment, news, and public service programming. Any action which might run the risk of undermining or destroying this vital segment of the broadcasting industry would seriously disserve the public interest." Option Time Rules, 18 RR 1801, 1834 (1958).

In 1960 the Commission reiterated its conviction that "the national networks have made invaluable contributions in the development of our system of television broadcasting and that networking is necessary to continued growth and expansion of the service." Option Time Rules, 20 RR 1568, 1570 (1960).

The public importance of networking was again noted in the ABC Merger Case, 9 FCC 2d 546; 10 RR2d 289 (1967), where the Commission cited the ABC Television Network's competitive disadvantage as resulting in "adverse effects...on the public interest" (9 FCC 2d at 570; 10 RR2d at 316).

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*/ Citations to "FCC" or "FCC 2d" are to Federal Communications Commission Reports. Citations to "RR" or "RR 2d" are to Pike and Fischer Radio Regulation.

Commission Rules and Policies have also been directed toward making network programs more widely available to the public. Thus 47 C.F.R. §73.658(b), adopted in 1955,*/ severely restricts territorial exclusivity in network affiliation agreements and 47 C.F.R. §73.658(l), adopted in 1971,**/ mandates the availability of network programs to particular stations under specified conditions. Also, the Commission has strongly supported the forced availability to other stations in the same community of network programs which affiliates elect not to broadcast. Availability of Network Programs to Non-Affiliates, 20 RR2d 1687 (1970).

At the same time the Commission has long been mindful of its responsibility to take regulatory action to insure that network operations, in their many and varied facets, are wholly consistent with the public interest. This exercise of responsibility has been mandated by 47 U.S.C. §303(g), which provides for encouragement of "the larger and more effective use of radio in the public interest", and by 47 U.S.C. §303(i), which authorizes "special regulations applicable to...stations engaged in chain broadcasting". Over the past 30 years the Commission has adopted various

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*/ See Revision of Territorial Exclusivity Rule, 12 RR 1537 (1955).

**/ See VHF Station Network Affiliations, 28 FCC 169; 21 RR2d 1638 (1971).

network regulations (see 47 C.F.R. §73.131-138(AM), 73.231-238(FM), and 73.658(a)-(l)(TV) -- consistently sustained by the Courts. National Broadcasting Co. v. United States, 319 U.S. 190 (1943); Metropolitan Television Company v. FCC, 289 F.2d 874 (D.C. Cir. 1961); and Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971).

In Network Television Broadcasting, 23 FCC 2d 382; 18 RR2d 1825 (1970), reconsideration generally denied, 25 FCC 2d 318; 19 RR2d 1869 (1970), affirmed sub nom. Mt. Mansfield Television, Inc. v. FCC, supra, the Commission adopted the Prime Time Access Rule (47 C.F.R. §73.658(k)) and the related Syndication and Financial Interest Rules (47 C.F.R. §73.658(j)). Even this decision, adopting the Prime Time Access Rule as a restraint upon network operations, implicitly recognized that such operations are essentially desirable; the Commission's goal was to create additional competitive opportunities for other segments of the television industry.*/ Thus, the

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*/ In Availability of Network Programs to Non-Affiliates, 20 RR2d 1687 (1970), the Commission explained the relationship of the Prime Time Access Rule to its action supporting the forced availability of network programs to certain stations: "While the two actions are designed to further different public interest objectives, and to a degree may look in different directions, they are by no means inconsistent nor in conflict. In the present matter, we seek to make desirable network programming more generally available to other stations when it is not carried in a market by the regular affiliate, thus benefitting these stations and the public. ... In the other action, we have sought to encourage the production of programs by independent sources through opening up to them a substantial economic base, a portion of prime time on the well established facilities (nearly all VHF) which are the network affiliates in the top 50 markets." (20 RR2d at 1706).

Commission adopted a rule restricting network and similar programming to three hours, in the four hour 7-11:00 p.m. period, per night. It selected this particular remedy, affecting at most 25% of prime time, as preferable to another considered remedy affecting 50% of all network programming. And it did not adopt various other versions of a Prime Time Access Rule advanced by participating parties, including the Westinghouse variation which would not have excluded off-network product from the access hour.

In short, the specific Prime Time Access Rule adopted, and which this Court approved in Mt. Mansfield, reflected the deliberate consideration of the Commission, based upon a voluminous record and an obvious expertise in the field, that this particular Rule was then the most desirable remedy to the conditions found to prevail. Notwithstanding this fact, there is no reason to believe that had the Commission in 1970 fashioned a slightly different remedial regulation, perhaps the one which Westinghouse then proposed, this Court would not have affirmed the reasonableness of that judgment -- recognizing the function of the regulatory agency in fashioning regulatory remedies and the limitations upon Court review.

B. The Revised Rule Is A Modified Restraint Designed Both To Foster Program Source Diversity and To Maximize Program Service in the Public Interest

As this Court is aware from the Mt. Mansfield proceeding, the Prime Time Access Rule was controversial and its anticipated effects uncertain. The Commission's decision adopting the Rule acknowledged that the results could not be guaranteed. The Commission's Brief in this Court even urged: "The possibility that the Rule may in practice prove ineffective is inherent in the rulemaking process and does not render it unreasonable." Recognizing the need in these circumstances to maintain continuing scrutiny over the situation, the Commission held open its docket wherein the Rule was adopted and specifically held out the prospect of review of the Rule's effectiveness. The expectation of on-going scrutiny was urged to this Court.

The Commission's Docket No. 19622 proceeding, whose Report and Order is here under review, constituted the further study and consideration of the Rule in operation to which the Commission was committed. While the study was initiated at an early stage and while some considered it premature, the decision of when to undertake the study was clearly discretionary with the Commission. Moreover, the study was not brought to an early conclusion as originally suggested, but rather spanned a period of over one year. Further, the

rulemaking proceeding was not limited to the originally contemplated comments and reply comments, but included further procedures such as the opportunities for furnishing supplemental comments and for oral argument (which lasted over 14 hours, spanning two full days).

The Commission's Docket No. 19622 proceeding brought extensive participation by both industry and non-industry elements. A most substantial record was compiled, and positions were vigorously and effectively asserted. An extremely broad range of views was advanced, extending from the positions of NAITPD and Westinghouse in near-total defense of the original Rule to the position of the major Hollywood motion picture companies and some others favoring outright repeal of the Rule.

It is against this background that the Commission's Report and Order must be assessed, and it is against this background that Petitioners' attack upon the Report and Order, and specifically the revised Rule, must be judged. Thus, contrary to Petitioners' suggestion, the Commission was fully mindful of the policy considerations which led to adoption of the Rule in the first instance -- a fact which is self-evident from the detailed recitation of background at threshold paragraphs 4-25 of the Report and Order. What

the Commission did in this proceeding was not to abandon the Rule's objectives but to refine, in light of two-plus years of operating experience, the regulatory remedy which it originally framed without the benefit of that experience. In doing so, it quite properly took into account the full range of relevant public interest considerations appropriate to the encouragement of the larger and more effective use of the radio in the public interest. General Telephone Co. of California v. FCC, 413 F.2d 390, 399-400 (D.C. Cir. 1969). See also United States v. Southwestern Cable Co., 392 U.S. 157 (1968); Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359 (D.C. Cir.), cert. denied 375 U.S. 951 (1963). It was for this reason that the decision, in one degree or another, considered such matters as whether access time programming was serving the public interest and the extent to which it was desirable to exempt network and off-network programming from particular time periods or in particular programming categories. In short, the Commission refined its Rule so as to balance more precisely what it conceived were the public interest factors weighing for and against restraints upon network operations, and the particular details of those restraints.

C. The Revised Rule, As Expected To Operate, Is Not A Major Departure From The Original Rule

Petitioners go to considerable pains to argue that the revised Rule constitutes a major departure from the original Rule. This is misleading because Petitioners focus more upon the theoretical than upon the expected. The Commission expects that the practical effects of the Rule changes will be limited; if it should prove otherwise, the Commission is fully able to protect the public interest.

The original Rule limited network programming to three hours during the four hour prime time period each night. With Commission urging,*/ that three hour period proved to be 8-11:00 p.m. except for Sunday when it was 7:30-10:30 p.m. Under the revised Rule the networks are free to program 8-11:00 p.m. and 7-7:30 p.m. weeknights and 7-11:00 p.m. Sundays.

Insofar as the 7-7:30 p.m. period is concerned, historically (i.e., before the Prime Time Access Rule was adopted) the networks did not program the 7-7:30 p.m. half hour weeknights except to the extent that an early evening network news "feed" may have been available to stations during this period; however, that network practice was permissible, pursuant to Commission waiver policies, under the original Rule. In adopting the original Rule, the Commission expressly recognized that its action involved opening up but one half hour

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*/ On March 12, 1971 the Commission directed correspondence to the three national television networks wherein it said: "Specifically, the Commission believes that the selection of an 8:00-11:00 p.m. time period would better serve the public interest as a general matter." 21 RR 2d 1586 (1971).

since the 7-7:30 p.m. period was already open. Network Television Broadcasting, 23 FCC 2d 382; 18 RR2d 1825, 1843 (1970). Thus under the original Rule, the access hour on weeknights has been 7-8 p.m. Under the revised Rule, and assuming networks do not unexpectedly program the 7-7:30 p.m. period (which they have never programmed), largely the same condition will prevail. The principal change is, therefore, with respect to Sunday, where the networks will be free to program 7-11:00 p.m. (as NBC has announced it intends to do) in contrast to the present pattern of 7:30-10:30 p.m.

While the Commission anticipates only a slight change in network activity, and that on Sunday, it should be noted that stations will be free to use any program product available, including off-network, in the 7-7:30 p.m. period. The practical effect of this development is that off-network program product will be in competition with original product for the 7-7:30 p.m. period. While this represents a change, it is by no means clear, with the access market producers and programs established following the initial operating period of the Rule, that original product will not be able to compete with repeats of programs formerly seen on networks. In any event, the Commission has never taken the position that its objective was to create a competition-free haven

for the access market producers. It should also be noted that the change in this respect is essentially consistent with the rule which Westinghouse first urged as an appropriate restraint upon network operations.*/

The second area of change concerns the product which stations are free to use in the 7:30-8:00 p.m. half hour. Under the original Rule stations could use motion pictures which had not been exhibited in the market within two years; under the revised Rule all motion pictures are excluded. Not only is this a relatively minor change, but its practical effect is to improve the competitive opportunity for original product produced for the access market. In other words, this change expands the restraint for which Petitioners argue.

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*/ As late as July 2, 1970, Westinghouse urged the following position on the Commission:

> The original Group W proposal did not include a prohibition against the use of off-network syndicated programming or feature films previously shown in the market. While Group W appreciates the reasons underlying the Commission's prohibition, it does not consider such prohibitions absolutely essential to the success of the rule. As an alternative, the Commission might consider an expression of policy in its future pronouncements on the rule which would make it clear that it expects stations to fill the released time with new programming to the extent possible. Another alternative would be to apply the prohibition only to the one-half hour of released time (1 hour on Sunday) thereby not disturbing the affiliate's current off-network and feature film inventories and the present market of the off-network syndicators such as MCA.

Westinghouse "Opposition to Petitions for Reconsideration" in Commission Docket No. 12782, pp. 19-20, reprinted in Mt. Mansfield Joint Appendix at JA 826-27.

The third area of change pertains to network programming which is in effect exempt from the Rule. The original Rule granted exemption or waiver for certain program categories, including specifically special news programs dealing with fast breaking news events, on-the-spot coverage of news events, political broadcasts by legally qualified candidates, early evening network newscasts under certain circumstances (waiver policy), one-time-only news and public affairs programs (waiver policy), and sports runovers (waiver policy). The revised Rule contains most of these exemptions and expands them in certain respects. The principal expansion is to permit one access half hour per week to be filled by network (or off-network) programming which is in the nature of children's specials, documentaries*/ or public affairs programs.

The fourth area of change is not really a change at all. It is rather the exhortation contained in paragraph 88 of the Commission's Report and Order, expressing the Commission's expectation that "stations subject to the rule will devote an appropriate portion of this 'cleared' time, or at least of total prime time, to material designed for children, material which is of particular significance with respect to

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*/ The proper status of news documentarires was a borderline choice in connection with the original Rule; one Commissioner filed a separate opinion dissenting to the Commission's failure to exempt such documentaries.

interests, problems, and affairs of minority groups, and/or other material particularly directed to the needs and problems of the station's community or coverage area as disclosed in its regular efforts to ascertain community needs." The First Amendment significance of this exhortation is discussed at pages 29 - 31 of this Brief. It is sufficient here to point out that not only is this not part of the revised Rule as such, but, in context of the entire proceeding, does not represent a very significant change.

During the Commission's Docket No. 19622 proceeding proponents of the Rule, including Petitioners and ABC, pointed out that one of the benefits of the Rule was the voluntary use of such local program material in the access period by many stations. Indeed, the tendency toward increased use of access time for local programming was a matter of considerable discussion in the comments and at the oral argument. Viewed against this background, the Commission's exhortation at paragraph 88 comes not as a major change from past directions but rather as an agency encouragement of a direction which was cited by the proponents of the Rule as one of its important benefits.

Finally, the fact that the Commission has retitled the Rule "Evening Program Requirements" is hardly worthy of serious discussion.

It is thus apparent that the Commission has not made major or radical changes in the Rule. The changes, at least in anticipated practical effect, are small and essentially in the nature of refinements dictated by the statutory mandate to "encourage the larger and more effective use of radio in the public interest." Should Commission expectations prove wrong, the agency has full power to make further refinements in the Rule.

D. Petitioners' Challenge to the Revised Rule Based Upon Alleged Inconsistency with Regulatory Objective and Responsibility Is Misconceived

Petitioners' challenge to the Commission's decision, claiming that the revised Rule bears no rational relationship to the Commission's regulatory objective or is inconsistent with the Communications Act licensing scheme, simply ignores what the Commission undertook to do in this proceeding. Petitioners argue that because the new Rule is in part a relaxation it is inconsistent with the underlying objective of the original proceeding adopting the Rule. Such a contention is specious. There was nothing foreordained in the particular regulatory remedy which the Commission originally adopted, and certainly there is no obstacle to the Commission, based upon operational experience with the Rule, refining the regulatory remedy. Just as the

Prime Time Access Rule was a somewhat more stringent remedy than Westinghouse originally recommended and a somewhat less stringent remedy than the Commission originally proposed, it was responsive to the basic problem which the Commission considered to exist. Indeed, in certain respects the revised Rule is more stringent than the original Rule and more responsive to the concerns which prompted the original Rule.

Petitioners are also wrong in their contention that the Commission's action adopting the revised Rule was in the nature of an adjudication of competing private demands of participating parties. The Commission's decision was effectively reached prior to its November 29, 1973 Public Notice (JA 47). While the decision undoubtedly reflected compromises of points of view of participating parties (both private and public) and of individual Commissioners, there is not the slightest basis for alleging that the then seven-member Commission was doing other than balancing the public interest considerations for and against the Rule. Obviously, when an administrative agency reaches a decision in an area of this kind some private interests are more or less affected, but this does not mean that the agency has merely adjudicated private claims. Here the Commission

balanced all the public interest factors, and decided upon a regulatory remedy as it conceived the public interest to require. That there were divergent views within the seven member Commission, which views were compromised into a unanimous statement of position, is not surprising, and it is certainly not a legal basis for this Court to reverse.

NAITPD's suggestion that the Commission's failure to consider the impact of the revised rule on the allegedly interrelated Syndication and Financial Interest Rules constitutes reversible error is similarly ill-conceived. The Syndication and Financial Interest Rules are fully operative, and unaffected by this proceeding. In short, networks no longer syndicate programs and, so far as ABC is aware, no longer acquire subsidiary rights or interests in outside-produced programs. Nothing in the revised Rule changes these prohibitions. Moreover, it would appear from the Mt. Mansfield decision that the interdependence between the Prime Time Access Rule and the Syndication and Financial Interest Rules which the Court noted was just the opposite of that which NAITPD claims. The Court observed that the Syndication and Financial Interest Rules were needed to make the Prime Time Access Rule effective, not necessarily vice versa. In any event, all three rules will continue, albeit one in slightly modified form.

## III. The Revised Rule Does Not Contravene First Amendment or Section 326 Rights

Petitioners argue that the revised Rule contravenes the First Amendment to the United States Constitution and 47 U.S.C. §326. In short, they claim that the revised Rule abridges free speech and constitutes censorship.

This is not the first time that this Court has had occasion to pass upon contentions that the Prime Time Access Rule violates the First Amendment (or Section 326). Such arguments were forcefully advanced in Mt. Mansfield Television, Inc. v. FCC, supra, and there rejected. This rejection followed the general teaching of the Supreme Court in National Broadcasting Co. v. United States, 319 U.S. 190 (1943), where the Commission's original network rules were upheld against a First Amendment/Section 326 challenge, and Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), where the Commission's Fairness Doctrine was upheld against similar challenges.

The Red Lion decision is particularly significant. While recognizing that important First Amendment rights accrue to broadcasters,*/ the Court stressed the public's right to have the broadcast media function consistent with the ends

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*/ See also Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973).

and purposes of the First Amendment. Thus, the Court said: "It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here" (395 U.S. at 390-91). To the extent that the revised Rule poses different First Amendment questions than did the original Rule as considered in Mt. Mansfield, it can only be because of the Commission's demonstrated interest in the programming results which the original Rule generated and which the revised Rule can be expected to generate. Yet, that interest was in furtherance of the right of the public, including children, to receive "suitable access to social, political, esthetic, moral and other ideas and experiences". The Commission apparently believed that the regulatory structure represented by the revised Rule would better contribute to the public's First Amendment rights.

Petitioner NAITPD argues at length that the specific rule refinements adopted by the Commission are inconsistent with standards articulated in Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), cert. denied sub nom. Tobacco Institute v. FCC, 396 U.S. 842 (1969). While the Banzhaf case is instructive, and indeed underscores the sensitive and fragile nature of the First Amendment relationships involved in Commission regulation in the programming area, the case is

not really apposite. For in Banzhaf the Court found that the extension of the Fairness Doctrine there involved was "an unusual limitation of the licensee's discretion" (405 F.2d at 1096). Thus, the Court undertook a more detailed examination of First Amendment and Section 326 considerations than would be warranted by the instant case. The revised Rule here under consideration imposes no unusual limitation of licensee discretion beyond that already sanctioned by this Court in Mt. Mansfield.

The specific program content matters to which the revised Rule is directed can be separated into three categories. First, there is the prohibition against stations carrying network, off-network or feature film product in the 7:30-8:00 p.m. period. Except to the very limited extent that the prohibition against motion pictures has been made total, from a legal standpoint this is the same restriction which was approved in Mt. Mansfield.

Second, the Commission has granted exemptions for certain kinds of network and off-network programming, either generally, under specified conditions, or for one half hour per week. While the exemptions are somewhat more expansive than under the original Rule, in concept they are the same. The Commission has simply said that certain categories of programming are so affected with the public interest that

they should not be subject to restraint. All are categories which the Commission has recognized in other contexts to have important public interest ramifications.*/ However,

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*/ In the Report and Statement of Policy Re: Commission En Banc Programming Inquiry, 20 RR 1902 (1960), the Commission set out certain generic categories of broadcast service which it considers necessary or desirable to serve the broadcast needs and interests of the public. These categories include inter alia: Programs for children; public affairs programs; political broadcasts; news programs; and sports programs. The public interest significance of these types of programs is so highly regarded that the full list is reprinted in an Attachment to each application form for Commission authority to construct a new broadcast station or make changes in an existing station (FCC Form 301); for renewal of broadcast station license (FCC Form 303); and for Commission consent to assignment or transfer of a broadcast station construction permit or license (FCC Forms 314 and 315); the Attachment is reproduced as Appendix B of this Brief. Furthermore, the Commission requires in these applications a statistical breakdown of the minimum hours proposed to be devoted each week to news, public affairs and "other" non-entertainment and non-sports programming.

By Notice of Inquiry in Docket No. 19154, Pike and Fischer Radio Regulation, Current Service, 53:429 (1971), the Commission recently re-emphasized its belief that local broadcasts and programming designed to inform the local electorate (news and public affairs) are essential to furnish "substantial [broadcast] service" in the public interest.

The significance of children's programming has also been underscored by the Commission's Interim Report and Order in Docket No. 19153, relating to renewal of broadcast licenses, where a new question was added to the television station renewal form requiring applicants to set forth "a brief description of programs, program segments or program series aired during the license period that were primarily directed to children twelve years old and under". ___ FCC 2d ___; 27 RR 2d 535, 613 (1973). It has also been highlighted by the Commission's Notice of Proposed Rule Making in Docket No. 19142 concerning possible direct regulation with respect to children's programming. Pike and Fischer Radio Regulation, Current Service, 53:391 (1971).

what is most significant is that the Commission has not required that any such program be offered by networks or broadcast by stations. It has merely tailored its otherwise lawful restriction to accommodate such programs if networks choose to offer them and if stations choose to broadcast them (pursuant to 47 C.F.R. §73.658(e), each station is free to reject any network program).

Third, the Commission has exhorted stations to use some of the access time, or at least some of all prime time, for "material designed for children, material which is of particular significance with respect to interests, problems, and affairs of minority groups, and/or other material particularly directed to the needs and problems of the station's community or coverage area as disclosed in its regular efforts to ascertain community needs." Initially, it should be noted that this is not a rule requirement; rather, it is an exhortation. Moreover, it is framed generally and related to the well-established principle of the Communications Act licensing scheme that station licensees have an obligation to program for the needs, tastes and interests of the public which they serve. So fundamental is this concept that the Commission has barely done more than restate the kinds of obligations which it has

repeatedly found to exist.*/

This exhortation, unlike the kind of "unusual limitation of the licensee's discretion" which the Banzhaf Court scrutinized in great detail (and then approved), is in the category which that Court concluded "minimizes the dangers of censorship or pervasive supervision." Thus, it would appear to fall squarely within the ambit of the following excerpt from the Banzhaf decision:

> "Thus, in applying the public interest standard to programming, the Commision walks a tightrope between saying too much and saying too little. In most areas it has resolved this dilemma by imposing only general affirmative duties -- e.g., to strike a balance between the various interests of the community, or to provide a reasonable amount of time for the presentation of programs devoted to the discussion of public issues. The licensee has broad discretion in giving specific content to these duties, and on application for renewal of a license it is understood the Commission will focus on his overall performance and good faith rather than on specific errors it may find him to have made. In practice, the Commission rarely denies licenses for breaches of these duties. Given its long-established authority to consider program content, this general approach probably minimizes the dangers of censorship or pervasive supervision." (405 F.2d at 1095).

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*/ In its Report and Statement of Policy Re: Commission En Banc Programming Inquiry, 20 RR 1902 (1960), the Commission stated that "[t]he broadcaster is obligated to make a positive, diligent and continuing effort, in good faith, to determine the tastes, needs and desires of the public in his community and to provide programming to meet these needs and interests." So critical is this obligation that a failure to meet it is grounds for denial of a broadcast license. Henry v. FCC, 302 F.2d 191 (D.C. Cir. 1962), cert. denied 371 U.S. 821 (1962).

Of course, ABC is concerned that the Commission not intrude unnecessarily or excessively into the programming area. The potential for abuse in attempting to straddle this recognized regulatory "tightrope" is always present and must be guarded against accordingly. At the same time, it must be acknowledged that the Commission is not without some authority, indeed responsibility, in this area. While ABC believes that such authority and responsibility should always be exercised with maximum restraint and in the least intrusive manner, it considers the subject Report and Order and the revised Rule consistent with current First Amendment/ Section 326 Standards.

## IV. The Commission Gave Adequate Notice to Enable It to Adopt the Revised Rule Without Further Rule Making Proceedings

Petitioner Westinghouse argues that the Commission gave inadequate notice to adopt certain of the particular rule changes which were made because some of these changes can be considered to fall within areas which were the subject of the Notice of Inquiry only. In this connection it is pointed out that the Commission issued a combined Notice of Inquiry and Notice of Proposed Rule Making; as to the Inquiry portion, it indicated that changes along the lines there indicated would be made, if at all, only after further rule-making proceedings.

Initially, it should be recognized that Section 4 of the Administrative Procedure Act (5 U.S.C.§553(b)(3)) requires that a Notice of Proposed Rule Making include "either the terms or substance of the proposed rule or a description of the subjects and issues involved" (emphasis added). It is well established that notice is adequate if it consists of no more than a description of the subjects and issues involved. California Citizens Band Association v. United States, 375 F.2d 43 (9th Cir. 1967), cert. denied 389 U.S. 844 (1967). See also, Logansport Broadcasting Corp. v. United States, 210 F.2d 24 (D.C. Cir. 1954); Willapoint Oysters, Inc. v. Ewing, 174 F.2d 676 (9th Cir. 1949), cert. denied 338 U.S. 860 (1949); and Owensboro on the Air, Inc. v. United States, 262 F.2d 702 (D.C. Cir. 1958), cert. denied 360 U.S. 911 (1959). Here, the Notice of Proposed Rule Making, as distinguished from the Notice of Inquiry, was far more than a general description of the subjects and issues involved. Thus, it surely meets that minimum test. Further, it was an unusually detailed discussion of the various issues for consideration (see JA 1-33), and all of the changes in the Rule which the Commission in fact made were consistent with the scope of the rule making portion of the proceeding even if they did overlap with some of the Inquiry subjects.

That the Commission expressed an intention to afford an opportunity for comment upon the Inquiry subjects, but then failed to do so, would not be a fatal flaw even were this Court to conclude that the changes adopted were not all comprehended under the Notice of Proposed Rule Making. Such a situation occurred in Buckeye Cablevision, Inc. v. FCC, 387 F.2d 220 (D.C. Cir. 1967), where the Commission adopted rules which its Notice had anticipated would only be considered after affording a further opportunity to comment.

It is also significant that the particular rule changes which Westinghouse claims were not comprehended by the Notice of Proposed Rule Making are all essentially minor and in one instance not a rule change at all.

With reference to Inquiry subject (b),*/ "required local uses of the access period", it is clear that the Commission has imposed no requirement notwithstanding the paragraph 88 exhortation. Moreover, the paragraph 88 exhortation is not restricted to the access period but comprehends all of prime time. Indeed, the general subject of local use of the access period was one that was fully treated in the rulemaking by many commenting parties, including Petitioners NAITPD and Westinghouse.

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*/ For Inquiry subjects, see JA 23.

With respect to Inquiry subject (d), "specifying a particular hour as the 'access period'", it is also clear that the Commission was there discussing a mandated change in the access hour from that which was then in effect; for example, an hour in the middle of prime time instead of at the beginning of prime time. While the Commission has now formally specified the access period, it has not changed that period from the existing practice which it encouraged from the beginning. It is still the Commission's expectation that network schedules will be principally confined to the 8:00-11:00 p.m. period weeknights.

With respect to Inquiry subject (c), "encouraging, by way of exemption...the presentation of...[certain] types of material", it is apparent that to a limited extent the Commission has done this. However, this exemption approach was to a large extent comprehended by the Notice of Proposed Rule Making as well as the Notice of Inquiry. For example, Notice paragraph 35 dealt with various problems associated with live sports events which have now been treated in the Rule exemptions. Similarly, Notice paragraph 45 dealt with the subject of news and public affairs programming, which is also now treated in the Rule exemptions. Finally the subject of Rule repeal was clearly comprehended by the Notice

of Proposed Rule Making, and to the extent that the Commission has created an exemption for one half hour per week for certain programs this is conceptually a refined form of partial repeal -- just as the Rule was partially repealed in the case of Sunday.

Petitioner Westinghouse claims that it was misled and missed an opportunity to comment. When the Commission issued its November 29, 1973 Public Notice announcing the substance of the revised Rule as instructions to its Staff Westinghouse had notice and opportunity to come forward and comment further (or seek the opportunity to comment further). That the Commission would have considered a post-November 29, 1973 submission seems most probable in light of the Commission's substantive consideration of the December 14, 1973 "Petition for Clarification" filed by Petitioner NAITPD and the Association of Independent Television Stations, Inc.

In short, the Commission gave adequate notice to support the Rule changes which it adopted.

## CONCLUSION

For the foregoing reasons the Petitions for Review

should be denied and the Commission's adoption of the revised Rule affirmed.

Respectfully submitted,

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April 1, 1974

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Everett H. Erlick
Senior Vice President and General Counsel

June 7, 1973

Mr. Ben F. Waple
Secretary
Federal Communications Commission
Washington, D. C. 20554

Dear Mr. Waple:

This letter is submitted for association with the Commission's current rulemaking proceeding in Docket No. 19622 with respect to the Prime Time Access Rule. Its principal purpose is to furnish the Commission with current information on certain public affairs and minority-interest programming which both the ABC-owned television stations and the ABC Television Network will offer in the Fall 1973 Season.

In ABC's opening comments in this proceeding we noted that a number of stations in the top-50 markets are broadcasting some local news and public affairs programs during access time. For example, ABC's-owned station in Chicago, WLS-TV, is presently filling 11 of the 14 access half hours each week with local news (including public affairs segments). While the presentation of news and public affairs programming in the access period was not one of the Commission's primary objectives in adopting the Rule, we noted that the presentation of this kind of programming in access time has been a constructive and desirable side-effect of the Rule's operation.

ABC has now determined that effective with the Fall 1973 Season, and assuming continuation of the Rule:

1. Each of the ABC-owned stations will devote at least one half-hour per week of access time to local programming directly responsive to community problems in the markets served. Already three of ABC's owned stations (KABC-TV, Los Angeles; KGO-TV, San Francisco; and WXYZ-TV, Detroit) are offering a half-hour local public affairs program in access time. Starting in the Fall 1973 Season, Station WABC-TV, New York City, will move a half-hour local public affairs program (with supplemental budget) into access time and Station WLS-TV, Chicago, will add such a program in access time. A substantial amount of this community-oriented programming has been, and we expect will continue to be, responsive to the needs and interests of minorities who live in these areas.

2. The ABC Television Network will broadcast at least 12 special program segments, of 5 minutes duration each, highlighting the accomplishments and contributions throughout American history of preminent representatives of the minority communities. These special program segments will be presented in network prime time, following certain of ABC's Sunday Night Movie programs prior to 10:30 p.m. (NYT) and ABC's Monday Night Movie programs prior to 11:00 p.m. (NYT). Affiliated stations will also be authorized to video-tape these segments for such additional presentation as they may elect to make in their respective communities.

Two other matters affecting judgments about the value of the Prime Time Access Rule should be brought up to date now.

One involves the extent to which many successful access time programs have special appeal for particular audiences. In addition to those noted on pp. 12-13 of our opening comments, there is the new program Black Omnibus, which The New York Times for April 15, 1973 reported is now being carried in 55 markets (including 44 of the top-50). The Commission also has pending a request filed by Children's Television Workshop, which looks toward the presentation of a CTW children's program on a national network in access time.

The other involves the beneficial effects of ABC's improved competitive position. The ABC Television Network, after losing more than $100 million between 1963 and 1971, is now showing a profit and, with the Rule, we foresee a continuation of that condition. The importance of strengthening ABC's competitive position has long been recognized by this Commission (see, e.g., 9 F.C.C. 2d 546 (1967), where the Commission laid heavy emphasis upon the public interest in insuring that "the ABC Television Network is permitted to operate in circumstances that will best allow it to fulfill its public service obligations by the presentation of news and public affairs programs and other quality television programming" (9 F.C.C. 2d at 570)). Indeed, ABC's ability to undertake the public affairs programming responsive to community problems and minority needs as described above is a direct outgrowth of that improved competitive position. Similarly, the

expansion of network public affairs programming typified by the weekly Reasoner Report (offered Saturday, 6:30 - 7:00 p.m. (NYT)), which began in January 1973, is also a result of ABC's improved competitive position.

In conclusion, ABC reaffirms its support for the Rule, and renews its commitment to help make the Rule work effectively.

Very truly yours,

Everett H. Erlick

Everett H. Erlick

## ATTACHMENT A

Attention is invited to the Commission's "Report and Statement of Policy Re: Commission En Banc Programming Inquiry" released July 29, 1960 - FCC 60-970 (25 Federal Register 7291; 20 Pike and Fischer Radio Regulation 1902).

Pursuant to the Communications Act of 1934, as amended, the Commission cannot grant, renew or modify a broadcast authorization unless it makes an affirmative finding that the operation of the station, as proposed, will serve the public interest, convenience and necessity. Programming is of the essence of broadcasting.

A broadcast station's use of a channel for the period authorized is premised on its serving the public. Thus, the public has a legitimate and continuing interest in the program service offered by the station, and it is the duty of all broadcast permittees and licensees to serve as trustees for the public in the operation of their stations. Broadcast permittees and licensees must make positive, diligent and continuing efforts to provide a program schedule designed to serve the needs and interests of the public in the areas to which they transmit an acceptable signal.

In its above-referenced "Policy Statement," the Commission has indicated the general nature of the inquiry which should be made in the planning and devising of a program schedule:

> "Thus we do not intend to guide the licensee along the path of programming; on the contrary, the licensee must find his own path with the guidance of those whom his signal is to serve. We will thus steer clear of the bans of censorship without disregarding the public's vital interest. What we propose will not be served by pre-planned program format submissions accompanied by complimentary references from local citizens. What we propose is documented program submissions prepared as the result of assiduous planning and consultation covering two main areas: first, a canvass of the listening public who will receive the signal and who constitute a definite public interest figure; second, consultation with leaders in community life -- public officials, educators, religious (groups), the entertainment media - agriculture, business, labor, professional and eleemosynary organizations, and others who bespeak the interests which make up the community."

Over the years, experience has shown both broadcasters and the Commission that certain recognized elements of broadcast service have frequently been found necessary or desirable to serve the broadcast needs and interests of many communities. In the Policy Statement, referred to above, the Commission set out fourteen such elements. The Commission stated:

> "The major elements usually necessary to meet the public interest, needs and desires of the community in which the station is located as developed by the industry, and recognized by the Commission, have included: (1) Opportunity for Local Self-Expression, (2) The Development and Use of Local Talent, (3) Programs for Children, (4) Religious Programs, (5) Educational Programs, (6) Public Affairs Programs, (7) Editorialization by licensees, (8) Political Broadcasts, (9) Agricultural Programs, (10) News Programs, (11) Weather and Market Reports, (12) Sports Programs, (13) Service to Minority Groups, (14) Entertainment Programming."

It is emphasized that broadcasters, mindful of the public interest, must assume and discharge responsibility for planning, selecting and supervising all matter broadcast by their stations, whether such matter is produced by them or provided by networks or others. This duty was made clear in the Commission's Policy Statement, page 14, paragraph 3:

> " Broadcasting licensees must assume responsibility for all material which is broadcast through their facilities. This includes all programs and advertising material which they present to the public. With respect to advertising material the licensee has the additional responsibility to take all reasonable measures to eliminate any false, misleading, or deceptive matter and to avoid abuses with respect to the total amount of time devoted to advertising continuity as well as the frequency with which regular programs are interrupted for advertising messages. This duty is personal to the licensee and may not be delegated. He is obligated to bring his positive responsibility affirmatively to bear upon all who have a hand in providing broadcast matter for transmission through his facilities so as to assure the discharge of his duty to provide (an) acceptable program schedule consonant with operating in the public interest in his community. The broadcaster is obligated to make a positive, diligent and continuing effort, in good faith, to determine the tastes, needs and desires of the public in his community and to provide programming to meet those needs and interests. This, again, is a duty personal to the licensee and may not be avoided by delegation of the responsibility to others."

## CERTIFICATE OF SERVICE

I, Thomas N. Frohock, hereby certify that copies of "Brief for Intervenor American Broadcasting Companies, Inc." in Case Nos. 74-1168 and 74-1283 have been served by first class United States mail, postage prepaid, this first day of April 1974, upon the following:

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